

No. 14,424

IN THE

United States Court of Appeals
For the Ninth Circuit

CASH COLE, et al.,

Appellants,

VS.

FAIRVIEW DEVELOPMENT, INC., et al.,

Appellees.

On Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Division.

APPELLANT'S PETITION FOR A REHEARING.

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FILED

OCT 27 1955

PAUL E. O'BRIEN, CLERK



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*To the Honorable William Healy, the Honorable
Walter L. Pope, and the Honorable James Alger
Fee, Circuit Judges:*

I.

PRELIMINARY STATEMENT.

On the 29th day of September, 1955, this Honorable Court affirmed the ruling of the Court below which denied a motion to set aside a compromise stipulation and to vacate judgment in the District Court for the District of Alaska, Fourth Division, and which rendered a judgment taking from the ap-

pellant one-half of the stock of the Fairview Development, Inc.

This Honorable Court held, in its opinion, that no abuse of discretion was discernible, nor error committed in the Court below.

II.

STATEMENT OF THE CASE.

This petition for rehearing seeks to have this Honorable Court reconsider its opinion on four points of law:

First. Are affidavits and oral evidence on one side only, a sufficient record on which to base a final determination, when said affidavits are controverted by many affidavits on the other side thereby creating a direct controversy, and the determination based upon such affidavits resisted?

Second. Is it not an abuse of discretion for the trial court to refuse to vacate a judgment which was not based upon trial in open court, when a trial on the merits is requested and evidence proffered?

Third. Is it not a deprivation of property without due process when a litigant is deprived of property by a judgment which is not based upon a trial of the merits of the case and which is objected to within a reasonable time?

Fourth. Is it not a deprivation of property to reach out and decide a matter not covered in the orig-

inal judgment and by said judgment take from the appellant his one-half of the stock in Fairview Development, Inc., without a trial and with the appellant being denied a hearing of any kind?

III.

SUMMARY OF ARGUMENT.

A. Affidavits and oral evidence on one side only are not a sufficient record upon which to base a final determination, when said affidavits are denied and the determination based upon such affidavits and one sided evidence resisted.

B. It is an abuse of discretion for the trial court to refuse to vacate a judgment which was not based upon trial in open court, when a trial on the merits is requested and evidence proffered.

C. It is a deprivation of property without due process when a litigant is deprived of property by a judgment which is not based upon the trial of the merits of the case and which is objected to within a reasonable time.

D. It is a deprivation of property without due process when the Court, long after final judgment in the case, and while hearing a motion to vacate the judgment, goes on beyond the original judgment and takes the one-half of the stock in Fairview Development Company which belongs to the appellant and without any testimony, and without any trial, de-

prives the appellant of his property without due process of law, and without even a resemblance of a trial in any way.

IV.

ARGUMENT.

A. The transcript in this case shows that there was no testimony given in open court to support appellant's case, but appellees had one hundred and ten pages of testimony taken in their behalf. (Tr. 462-571.) The only evidence for appellant that was before the lower court consisted of affidavits alone. This places the lower court in the incredible position of making a final determination in a case upon a record which consists of testimony introduced into open court for one side only, part of which was uncross-examined, and ex-parte affidavits, and by denying the appellant the right to a trial on the merits of the case.

This Honorable Court pointed out, on Page 2 of its Opinion, that the original suit presented a complicated factual situation. However, with all due respect to this Honorable Court, it seems impossible to determine the factual situation, complicated or otherwise, where one party litigant is not allowed to introduce evidence on the issues involved.

B. Because of the confused record and voluminous briefs, the undersigned humbly submits that an abuse of discretion by the lower court may have been overlooked by this Honorable Court. .

At pages 247-248 of the transcript the lower court made some extremely damaging Findings of Fact against the appellant. These findings are based largely upon the proceedings at the trial, which consisted of testimony in the appellees' case in chief. This being *prior* to the stipulation and purported settlement; and *prior* to the judgment attempted to be vacated. No testimony was received on the hearing appealed from here.

C. "An opportunity for hearing is one of the essential elements of due process, at least whenever it is necessary for the protection of the parties. It was a maxim of the common law that 'no man should be punished without an opportunity of being heard.' Hence, no one may be legally divested of his property unless he is allowed a hearing before an impartial tribunal, where he may contest a claim set up against him, and be allowed to meet it on the law and facts and show if he can that it is unfounded. * * *" (12 Am. Jur. 301.)

The cases supporting this basic concept of law are too numerous to cite, but some of the later cases in support of this are: *Anderson National Bank v. Lockett*, 321 U. S. 233, 88 L. Ed. 692, 64 S. Ct. 599, 151 ALR 824; *Griffin v. Cook County*, 369 Ill. 380, 16 N. E. (2d) 906, 118 ALR 1157; *Carrig v. Anderson*, 167 Kan. 238, 205 P. (2d) 1004, 9 ALR (2d) 545.

"The right under the due process clause to full hearing includes the right on the part of the party whose rights are sought to be effected to introduce evidence and have judicial findings

based upon it. A party has the right to the opportunity, when in court, to establish any fact, which, according to the usages of common law or provisions of the Constitution, would be a protection to his property or his liberty." (12 Am. Jur. 313-314.)

This right to introduce evidence is also supported by much authority, of which some of the leading cases are as follows:

Baltimore and Ohio Railroad Co. v. United States, 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797;

Louisville and N. R. Co. v. Finn, 235 U. S. 601, 59 L. Ed. 379, 35 S. Ct. 146;

Washington ex rel. Oregon R. and Navigation Co. v. Fairchild, 224 U. S. 510, 56 L. Ed. 863, 32 S. Ct. 535;

Wilkey v. State, 238 Ala. 595, 192 So. 588, 129 ALR 549;

State v. Sax, 231 Minn. 1, 42 N. W. (2d) 680, 18 ALR (2d) 929.

In the last cited case, one point held was:

"The exclusion of competent and relevant evidence on the ground that the trial court was in possession of the evidence, although it was not in the record, is not due process, * * *"

This case cited, among others, the *Chicago Junction* case, 264 U. S. 258, wherein Mr. Justice Brandeis stated at page 265,

"The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to

consider evidence introduced or to make any essential finding without supporting evidence is arbitrary action."

If the appellant herein was entitled to be heard in the lower court, he was entitled to introduce evidence and since his adversaries were heard, *and findings of fact made upon such evidence*, the lower court should have permitted him to be heard.

The appellant has been deprived of his property without due process by the refusal of the lower court to permit him to introduce evidence and have findings based upon it. It is admitted that under certain conditions the refusal to permit the introduction of evidence might not be a deprivation of property without due process, but it should be borne in mind, as indicated above, that the lower court made many findings of fact which are based upon the oral testimony taken in the appellees' case in chief. *The appellant was never allowed to refute this evidence by the introduction of his evidence in open court.*

D. We endeavored to make the issues clear in this appeal, but going through the maze of affidavits and many orders made, it is quite apparent that appellants were unable to adequately show to this Court, one of the real, absolute questions to be decided on this appeal. That is, when the appellant moved to set aside the judgment and stipulation of October 10, 1953, under Rule 60 of the Federal Rules of Civil Procedure, many affidavits and cross-affidavits were filed, and then in February of 1954, a motion was filed by the plaintiffs for the purpose of procuring an order of the Court making the appellant, Cash Cole, forfeit

his stock in the corporation in addition to all other things covered by the judgment. This was outside of the judgment that the appellants attempted to vacate, and then without any evidence to support this motion, the Court made an order, coupled with the order denying defendant's motion to vacate final judgment and one appointing a receiver and directing delivery of certificates of stock belonging to Cash Cole and his associate. This was never heard or tried in any way, and the trial judge, coupled with the final order denying the motion to vacate, the fourth paragraph of the order which directed the said Cash Cole and Bayview Realty, Inc., to assign and deliver their certificates evidencing the capital stock of the plaintiff corporation issued in their names ordering this stock issued and delivered to Nelse Mortensen, Cliff Mortensen and Frank V. Anderson. This the appellants were absolutely unable to impress upon this Honorable Court, because nowhere in the opinion, as rendered, was this matter mentioned in the slightest, although this order deprived these appellants of one-half of the stock in Fairview Development, Inc., and was then without even the slightest resemblance of a trial, and without any evidence to sustain it, and deprived these appellants of thousands of dollars in value, without any consideration whatsoever. (Tr. 255, Par. 4.) We also call your attention to the further orders immediately following this paragraph appointing a receiver and other orders. We still contend that this Court should pass on that question on this appeal as we conscientiously appeal to the sense of reason of this great Court, that this is wrong and should be corrected at least by setting aside this part of the judgment, in

that regard, even if it should sustain and affirm the action of the trial judge in denying the motion to vacate under Rule 60. We cannot understand how the trial judge could refuse to open the case at the request of the appellants, and then open it enough to render an affirmative judgment outside of the real issues in the case, taking property that belonged to the appellants (one-half of the stock of Fairview Development, Inc.), and give it to the plaintiffs.

We trust this Honorable Court will consider this matter in connection with the other portions of this Petition for Rehearing.

V.

CONCLUSION.

It is respectfully submitted that this Honorable Court, because of the confused record and difficult factual situation in this case, may have overlooked the points above which are considered vital by the undersigned, and that this petition for rehearing be granted.

Dated, Anchorage, Alaska,
October 26, 1955.

WARREN A. TAYLOR,
BELL, SANDERS & TALLMAN,
By BAILEY E. BELL,
*Attorneys for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I, BAILEY E. BELL, counsel for petitioner in the above-entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion, is well founded in law and in fact, and proper to be filed herein.

Dated, Anchorage, Alaska,
October 26, 1955.

BAILEY E. BELL,
*Attorney for Appellant
and Petitioner.*